



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.713 OF 2015

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

HOUSE MART LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute - recognition agreement

The claimant is a registered trade union under the provisions of the Labour Relations Act, 2007 (the LRA) and representing employee's interests in the sectors of distribution and commercial, bottling and brewing, laundry cleaning and tobacco trade. The respondent is a limited liability company.

The claim is that from September, 2013 to June, 2014 the claimant recruited 119 out of 200 members from unionisable employees of the respondent making it 59.9% and more than 51% simple majority required for recognition.

On 26th October, 2013 the claimant initiated the process of signing of the recognition agreement and sent a draft to the respondent together with check off forms but the respondent failed to sign the same.

The claimant visited the respondent severally to address the matter to no avail and on 2nd May, 2014 referred to the Minister under section 62 of LRA and who appointed a conciliator and who convened several meetings but did not resolve the dispute. On 19th November, 2014 the conciliator issued a certificate of an unresolved dispute.

The claim is that the respondent has since terminated the employment of several employees and members of the claimant on account of unionisation resulting in victimisation. Despite the claimant having a simple majority and there being no rival union covering the employees within the mandate of the claimant, the respondent has refused to recognise the claimant.

The claimant is seeking that under the provisions of section 54 of the LRA they have met the threshold of recognition by the respondent and the court should order the respondent to:

- a) *Recognise the claimant union as a properly constituted and representative body and the sole labour union representing interests of their employees.*
- b) *To deduct and remit union dues from all unionisable employees who have signed the claimant's check off form thereby acknowledging membership.*
- c) *Not to victimise, intimidate, harass or coerce of dismiss or terminate any of the union members as a result of union activities.*
- d) *To order the respondent to engage the claimant in collective bargaining within 30 days upon signing Recognition Agreement.*
- e) *Costs of the suit.*

The response is that the allegations made by the claimant are not true and further that its workforce has never reached the figures claimed and the claimant cannot have recruited the stated numbers of employees.

The claimant recruited casual employees who are normally engaged on a day to day basis to load and off load goods for the respondent and its clients. The claimant has deliberately repeated names on some of the check off form;

- a) Simon Mutisya Kiio;
- b) Okot Kenneth;
- c) Boniface Mutsami;
- d) Simon Mutisya;
- e) Ibrahim Atabachi;
- f) James Owuor;
- g) Titus Kiema;
- h) Daniel Chepkwony;
- i) Joshua Konama; and
- j) Kennedy Okot.

The claimant recruited persons who are not employees of the respondent and there are many warehousing companies in the same compound as the respondent and the casuals employed by the businesses tend to hang around the premises and may easily be taken as the employees of the respondent. This inflated the alleged numbers of recruited members of the claimant.

The response is also that the respondent is willing to engage with the claimant upon attaining the legal threshold of recognition. There is no evidence of victimisation of any employee for unionisation and the respondent was dissatisfied with the conciliators report and recommendations because it is already making reductions and remittances with regard to employees legitimately recruited to the claimant and COTU.

The orders sought should not issue.

On 22nd April, 2021 the court noting the single issue in dispute directed parties to file written submissions. Only the claimant complied.

The claimant in submissions reiterated the claim and the orders sought.

Determination

Section 54 of the LRA provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. See **Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station & Another [2017] eKLR and Kenya Building, Construction, Timber and Furniture Industries Employees Union v Kings Developers Limited [2020] eKLR.**

For a union to qualify for recognition it ought to prove that it has recruited a simple majority of the employees of the respondent, where the employer is a single entity or a simple majority of employees of members of an association, where the union seeks to be recognised by an association. This is the first qualification which is contained in subsection (1), (2) and (3) of Section 54 of the LRA.

The second qualification is at subsection 54 (8) of the LRA, that the court will take into account the sector in which the employer operates.

The right of recognition of a trade union under section 54 of the LRA must be read together with Section 17(11) of the Employment Act is explicit that no employer shall limit the right of an employee to dispose of his income in the manner he deems fit that;

No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

Further Section 19(1) (f) and (g) of the Employment Act, 2007 obliges an employer to deduct from the employees' wages -

(f) Any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) Any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

Union dues are in the nature of deductions under Section 19(1) (f) and (g) and the employee are free to require the employer to make deductions from his wages to remit as provided in the law.

In this case, the claimant's case is that as of June, 2014 had recruited 119 out of the 200 employees of the respondent and since there is no rival union should be recognised to allow for negotiation of a collective agreement and for the respondent to deduct and remit union dues in accordance with the check off forms submitted.

The respondent's case is that the alleged employees some are causals and engaged on a day to day basis and others are duplicated. The respondent fails to state its number of unionisable employees and save to state 10 employees are registered twice, the causal employees listed is not stated.

Even where the claimant removed those noted as double registered, the balance would be 109 out of 200 this would result 54.5% which is above the 51% threshold required for recognition.

The check off forms filed together with the Memorandum of Claim list 115 persons only. With the 10 contested with double registration, this leave a membership of 105 being 52.5%.

The line I too thin with the oscillating numbers. A fact finding at the shop floor is imperative to ensure industrial peace.

The analysis above put into account, the court must recognise that its orders should not issue in vain.

The claimant moved the court on 29th April, 2015 under Certificate of Urgency on the grounds that the respondent had refused to sign the recognition agreement and was victimising employees for unionisation. In the Memorandum of Claim, the same orders are sought as outlined above.

It is since 6 years and a half (6 14).

In the written submissions, the claimant does not outline the current status on the shop floor. It is not apparent that the claimant has retained the listed persons in its membership with liberty to pay union dues directly and hence sustain the relationship pending the determination of the matter.

With movement of labour and recognising the time span taken to address the matter herein, the response taken into account, to issue the orders sought would not aid industrial peace.

Parties shall return to the shop floor and ascertain the present and current membership of the claimant and initiate the process of recognition.

The claim that there is victimisation of unionisable employees with termination of employment is left without evidence. The Supporting Affidavit to the claim and to the Certificate of Urgency dated 28th April, 2015 is by Benson Luvayi the national organising secretary and Michael Kamau the Nairobi North Branch Secretary without attaching any evidence as to the alleged employees faced with victimisation by the respondent.

Accordingly, the claim herein seeking recognition of the claimant by the respondent is hereby declined; parties shall return to the shop floor to commence the process of recognition and upon good cause move the court.

Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

M. MBARU

JUDGE